

APPEAL NO. 031885
FILED SEPTEMBER 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 23, 2003. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____; that he had disability from June 7, 2001, through the date of the hearing; and that the appellant (carrier) waived the right to contest compensability of the injury by not timely contesting it in accordance with Sections 409.021 and 409.022. The carrier appeals these determinations and, additionally, asserts that the hearing officer erred in excluding several of its exhibits and the testimony of two of its potential witnesses.

DECISION

Affirmed as reformed in part; reversed and rendered in part.

EVIDENTIARY OBJECTIONS

The carrier contends that the hearing officer erred in excluding Carrier's Exhibit Nos. 6 and 9 through 15, as well as the testimony of two of its potential witnesses. The hearing officer noted that the Exhibit Nos. 9 through 15, as well as the identities of the witnesses were not timely exchanged as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) and that the carrier did not have good cause for its failure to comply with the exchange rules. We have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the exclusion of evidence, an appellant must first show that the exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We perceive no abuse of discretion in the hearing officer's application of the rules relating to exchange of evidence.

With regard to Carrier's Exhibit No. 6, the carrier asserts that the hearing officer's decision incorrectly reflects that this exhibit was not admitted. The transcript reflects that the carrier offered Exhibit Nos. 1 through 15; that the claimant objected to Exhibit No. 3 and Exhibits Nos. 9 through 15; that the hearing officer initially admitted Exhibit Nos. 1, 2, 4, and 8, and subsequently admitted Exhibit No. 3; and that the hearing officer excluded Exhibit Nos. 9 through 15. Although no ruling was made on the record with regard to Exhibit No. 6, there was no objection to its admission and the hearing officer's notations on the documentary evidence indicate that it was admitted into evidence. For these reasons, the hearing officer's decision is reformed to reflect that Carrier's Exhibit No. 6 was admitted into evidence at the hearing.

COMPENSABILITY AND DISABILITY

Whether the claimant sustained a compensable injury and had disability were factual questions for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer found that irrespective of the waiver issue, the claimant sustained a compensable injury and had disability. Nothing in our review of the record indicated that these determinations are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The compensability and disability determinations are affirmed.

WAIVER

Section 409.021(a) provides that the insurance carrier is to begin the payment of benefits as required by the 1989 Act or notify the Texas Workers' Compensation Commission and the claimant of its refusal to pay benefits within seven days after receiving written notice of the injury. The hearing officer found, and the evidence reflects, that the carrier first received written notice of the claimant's injury on "June 7, 2001 after normal business hours" and filed its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on June 15, 2001. The hearing officer then concluded that the carrier waived its right to contest compensability of the injury by not timely contesting it within seven days after receiving written notice of the claim. The carrier asserts that because notice from the employer was given to the carrier "after normal business hours" it did not receive notice until the following day, and timely contested compensability of the injury by filing a TWCC-21 on June 15, 2002.

In Texas Workers' Compensation Commission Appeal No. 030105, decided February 21, 2003, the Appeals Panel applied Rules 102.3(c) and (d) and determined that, because the written notice to the carrier was received after normal business hours, as defined by Rule 102.3(c), the carrier did not receive the written notice until the next working day per Rule 102.3(d). In the present case, because written notice to the carrier was received after normal business hours, the carrier did not receive written notice until June 8, 2001, and it timely contested the claim by filing its TWCC-21 on June 15, 2001. Thus, the hearing officer erred in deciding that the carrier had not met its statutory prerequisites to contest compensability. We reverse the hearing officer's determination that the carrier waived its right to contest compensability of the _____, injury, and render a new decision that the carrier did not waive its right to contest the compensability of the claim.

The hearing officer's compensability and disability determinations are affirmed. The hearing officer's waiver determination is reversed and a new decision rendered that the carrier did not waive its right to contest compensability of the claimed injury.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.**

Chris Cowan
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge